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cause, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicile was acquired in Nevada."[11*]

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Federal Venue—Plaintiff Denied Option to Sue in His Home District Where Federal Jurisdiction not Founded Solely on Diversity of Citizenship

The general federal venue statute reads: ". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded *only* on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[1*] A recent case has reiterated the well established judicial emphasis placed on the word "only" in the statute. Suit was instituted in federal court in the district of the residence of the plaintiffs and both diversity of citizenship and the presence of a federal question were set up as grounds for federal jurisdiction. Held: Since the federal judisdiction was not founded solely on diversity of citizenship each defendant was entitled to be sued in the district of which he was an inhabitant. On apt motion by the defendants the suit was dismissed.[2]

Federal venue is not the same thing as federal jurisdiction. Venue has to do with the geographical situs of the suit,—with which particular federal court shall hear the case; jurisdiction concerns the substantive power of any federal court to take cognizance of the suit. Even if jurisdiction is established the venue must still be properly laid.

[11*] In that event the Court will face these facts: first, that when the courts of divorce mill states find that divorce seeking transients are residents having no fixed intention to depart after the divorce is obtained, these courts are guilty of falsehood; second, the motive for the falsehood is to obtain the divorce business; third, if courts of other states are required by the Supreme Court to accept such a finding, then they are being required to recognize that their own citizens were domiciled where those citizens were not domiciled; fourth, the divorce mill states, if other states must recognize their product, are enabled to fix the divorce law for every state in the union as to those citizens having the price of a trip to the divorce mill states; fifth, whatever we may think should be the solution of the difficult and vital divorce problem, it would be hard to conceive of a worse method of solving it than to have the law fixed for the whole country by a few states framing their law with the motive of making profit from severing marriages.—Ed.

[1*] 18 STAT. 470 (1875), 24 STAT. 552 (1887), 25 STAT. 433 (1888), 28 U. S. C. A. §112 (1927) (Judicial Code §51). Italics supplied. The statute formerly read: "And no civil suit shall be brought before either of said courts [circuit or district] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding. . . ." 18 STAT. 470 (1875). Hollingsworth v. Adams, 12 Fed. Cas. 348, No. 6,611 (C. C. D. Penn. 1798).

[2] Mississippi Power & Light Co. v. Slaff, 131 F. (2d) 148 (C. C. A. 5th, 1942).

Unlike jurisdiction, proper venue may be created by consent. The right to be sued in a particular district is a personal privilege which may be waived,[3] and, in fact, it is so waived unless the question is actively and promptly raised.[4] It is now held that when a corporation establishes a process agent in another state it thereby consents to be sued there and waives any objection to the venue of federal courts in that state.[5*]

The statute involved in the instant case is a general act applying to all federal civil suits for which no special venue specifications have been provided.[6*] It does not apply to suits against aliens because the alien is a citizen of no particular state.[7] Hence, he can be sued

[3] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. ed. 167 (1939), 128 A. L. R. 1437, 1447 (1940); Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 S. Ct. 720, 52 L. ed. 1101 (1908); Matter of Moore, 209 U. S. 490, 28 S. Ct. 585, 52 L. ed. 904 (1908); Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 16 S. Ct. 272, 40 L. ed. 401 (1895); Central Trust Co. v. McGeorge, 151 U. S. 129, 14 S. Ct. 286, 38 L. ed. 98 (1894); Graver Tank & Mfg. Corp. v. New England Terminal Co., 125 F. (2d) 71 (C. C. A. 1st, 1942); Wabash Ry. v. Bridal, 94 F. (2d) 117 (C. C. A. 8th, 1938). *Contra:* O'Neil v. Co-Operative League of America, 278 Fed. 737 (M. D. Penn. 1922).

[4] Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 S. Ct. 720, 52 L. ed. 1101 (1908); Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 16 S. Ct. 272, 40 L. ed. 401 (1895); Graver Tank & Mfg. Corp. v. New England Terminal Co., 125 F. (2d) 71 (C. C. A. 1st, 1942); Wabash Ry. v. Bridal, 94 F. (2d) 117 (C. C. A. 8th, 1938). *Contra:* O'Neil v. Co-Operative League of America, 278 Fed. 737 (M. D. Penn. 1922).

[5*] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. ed. 167 (1939), 128 A. L. R. 1437, 1447 (1940); Note (1940) 18 N. C. L. REV. 232. Since a corporation is "found" wherever it has established a process agent, and since the establishment of a process agent waives venue objections, this case in effect reenacts the prior venue statute of 1875 insofar as corporations are concerned. See note 1 *supra*. Compare *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853 (1878), with United States v. Southern P. R. R., 49 Fed. 297 (N. D. Calif. 1892). This effect would be limited where the statute under which the process agent is established specifies that the agent is to be provided in order to accept process in certain types of suits. In such case the corporation does not agree to submit itself to any different suits and only waives its federal venue objection as to suits mentioned in the process agent statute. North Butte Mining Co. v. Tripp, 128 F. (2d) 588 (C. C. A. 9th 1942) (suit on cause of action arising outside the state). In North Carolina the local process agent statute requires every corporation having property or doing business within the state to provide an agent upon whom process in "all actions or proceedings against it" can be served. N. C. CODE ANN. (Michie, 1939) §1137. However, the service of summons statute provides that service of summons can be had on a foreign corporation only "when it has property, or the cause of action arose, or the plaintiff resides, in this state, or when it can be made personally within the state upon the president, treasurer or secretary thereof." N. C. CODE ANN. (Michie, 1939) §483.

[6*] Such as suits in states containing more than one district where different defendants are citizens of the same state but reside in different districts, or where property lies in different districts in the same state. 28 U. S. C. A. §§113-116 (1927). Suits under special statutes such as the patent acts or the Federal Employer's Liability Act, etc.

[7] *Re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1211 (1893); Vestal v. Ducktown Sulphur, Copper & Iron Co., 210 Fed. 375 (E. D. Tenn. 1911); *see* Automotive Equipment, Inc. v. Trico Products Corp., 10 F. Supp. 736, 739 (S. D. N. Y. 1935). *Contra:* Meyer v. Herrera, 41 Fed. 65 (W. D. Tex. 1889).

wherever valid service of process can be obtained. But where the alien is plaintiff the statute is applied to require suit in the district of the residence of the citizen defendant.[8*] It has no application to suits removed from state to federal courts.[9] In such case the theory is either that the statute does not apply because the suit is not in federal court by "original process or proceeding," or that plaintiff, by instituting the suit in the state court in that district, waives any objection to venue and that defendant by his petition for removal also waives any objections he might have.

The interpretation of the statute as applied in the instant case is well established by a long line of decisions.[10] Most of them have con-

[8*] Galveston, H. & S. A. Ry. v. Gonzales, 151 U. S. 496, 14 S. Ct. 401, 38 L. ed. 248 (1894); Fribourg v. Pullman Co., 176 Fed. 981 (E. D. N. C. 1910). But where removal is involved compare Keating v. Pennsylvania Co., 245 Fed. 155 (N. D. Ohio 1917); Barlow v. Chicago & N. W. Ry., 172 Fed. 513 (N. D. Iowa 1909); and note 9 *infra*, with Hall v. Great Northern Ry., 197 Fed. 488 (D. Mont. 1912). Similarly suits by the United States must be brought in the district of which defendant is an inhabitant. Davidson Bros. Marble Co. v. United States *ex rel* Gibson, 213 U. S. 10, 29 S. Ct. 324, 53 L. ed. 675 (1909); United States v. Southern P. R. R., 49 Fed. 297 (N. D. Calif. 1892).

[9] Great Northern Ry. v. Galbreath Cattle Co., 271 U. S. 99, 46 S. Ct. 439, 70 L. ed. 854 (1926); Lee v. Chesapeake & O. Ry., 260 U. S. 653, 43 S. Ct. 230, 67 L. ed. 443 (1923); Matter of Moore, 209 U. S. 490, 28 S. Ct. 585, 52 L. ed. 904 (1908); United States Fidelity & Guaranty Co. v. Board of Comm'rs of Woodson County, Kans., 145 Fed. 144 (C. C. A. 8th, 1906); Sterrett v. Hydro-United Tire Corp., 32 F. (2d) 823 (E. D. Penn. 1929); Keating v. Pennsylvania Co., 245 Fed. 155 (N. D. Ohio 1917); Waterman v. Chesapeake & O. Ry., 199 Fed. 667 (D. N. J. 1912); Hubbard v. Chicago, M. & St. P. Ry., 176 Fed. 994 (C. C. D. Minn. 1910); Barlow v. Chicago & N. W. Ry., 172 Fed. 513 (N. D. Iowa 1909); Burch v. Southern Pacific Co., 139 Fed. 350 (C. C. D. Nev. 1905); Empire Min. Co. v. Propeller Tow-Boat Co. of Savannah, 108 Fed. 900 (C. C. D. S. C. 1901); Whitworth v. Illinois Central R. R., 107 Fed. 557 (C. C. D. Ky. 1901); Cooley v. McArthur, 35 Fed. 372 (E. D. Mich. 1888); Robinson v. Attapulgus Clay Co., 55 Ga. App. 141, 189 S. E. 555 (1937); *see* General Investment Co. v. Lake Shore & M. S. Ry., 260 U. S. 261, 270, 43 S. Ct. 106, 111, 67 L. ed. 244, 253 (1922). *Contra:* Hall v. Great Northern Ry., 197 Fed. 488 (D. Mont. 1912); County of Yuba v. Pioneer Gold Mining Co., 32 Fed. 183 (C. C. N. D. Calif. 1887), *overruled* Wilson v. Western Union Tel. Co., 34 Fed. 561 (C. C. N. D. Calif. 1888).

[10] Male v. Atchison, T. & S. F. Ry., 240 U. S. 97, 36 S. Ct. 351, 60 L. ed. 544 (1916); Macon Grocery Co. v. Atlantic C. L. R. R., 215 U. S. 501, 30 S. Ct. 184, 54 L. ed. 300 (1910); Wilhelm v. Consolidated Oil Corp., 84 F. (2d) 739 (C. C. A. 10th, 1936); Webster Co. v. Society for Visual Education, 83 F. (2d) 47 (C. C. A. 7th, 1936); Sutherland v. United States, 74 F. (2d) 89 (C. C. A. 8th, 1934); Southern Pacific Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A. 9th, 1911); Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. Conn. 1939); Bacon v. Federal Reserve Bank of San Francisco, 289 Fed. 513 (E. D. Wash. 1923); Railroad Comm'rs of Florida v. Burleson, 255 Fed. 604 (N. D. Fla. 1919); City of Memphis v. Board of Directors of St. Francis Levee Dist., 228 Fed. 802 (W. D. Tenn. 1916); Rubber & Celluloid Harness Trimming Co., v. John L. Whiting—J. J. Adams Co., 210 Fed. 393 (D. Mass. 1913) (removal); Newell v. Baltimore & O. R. R., 181 Fed. 698 (C. C. W. D. Penn. 1910); Whittaker v. Illinois Central R. R., 176 Fed. 130 (C. C. E. D. La. 1910); Smith v. Detroit & T. S. L. Ry., 175 Fed. 506 (C. C. N. D. Ohio 1909); Cound v. Atchison, T. & S. F. Ry., 173 Fed. 527 (C. C. W. D. Tex. 1909); Sunderland Bros. v. Chicago, R. I. & P. Ry., 158 Fed. 877 (C. C. D. Neb. 1908); *see Re* Keasbey & Mattison Co., 160 U. S. 221, 228, 16 S. Ct. 273, 275, 40 L. ed. 402, 405 (1895); McCormick Harvesting Machine Co.

cerned the combination of diversity of citizenship with the presence of a federal question as basis for the federal jurisdiction.[11] At least one action was dismissed for improper venue where the suit was brought in the district of the residence of the plaintiff but the ancillary jurisdiction of the federal courts was added to diversity of citizenship as a ground for federal jurisdiction.[12] The statute clearly says "only," and uniformly the courts have construed this word to mean "solely" or "exclusively," thus denying the plaintiff any option to sue in federal court in his own district when the federal jurisdiction is founded on any other ground in addition to diversity of citizenship. Such a construction of the word seems reasonable enough at first glance and Mr. Justice Harlan, in a dissent in the leading case of *Macon Grocery Co. v. Atlantic Coast Line R. R.*, raised the only protest against the absurdities inherent in the operation of such law.[13]

The *Macon Grocery* case involved the typical situation in which federal jurisdiction was invoked on two grounds,—diversity of citizenship and presence of a federal question. Now, it is clear from the statute that where the sole ground of federal jurisdiction is diversity of citizenship the plaintiff has a right to bring the suit in the federal court of his own district.[14] (Provided always, of course, that he can

v. Walthers, 134 U. S. 41, 43, 10 S. Ct. 485, 486, 33 L. ed. 833, 834 (1890); Goff Co. v. Lamborn & Co., 281 Fed. 613, 616 (C. C. A. 5th, 1922); Trapp v. Baltimore & O. R. R., 283 Fed. 655 (N. D. Ohio 1922); Wogan Bros. v. American Sugar Refining Co., 215 Fed. 273, 274 (E. D. La. 1914); A. L. Wolff & Co. v. Choctaw, O. & G. R. R., 133 Fed. 601, 602 (E. D. Ark. 1904).

[11] Male v. Atchison, T. & S. F. Ry., 240 U. S. 97, 36 S. Ct. 351, 60 L. ed. 544 (1916); Macon Grocery Co. v. Atlantic C. L. R. R., 215 U. S. 501, 30 S. Ct. 184, 54 L. ed. 300 (1910); Wilhelm v. Consolidated Oil Corp., 84 F. (2d) 739 (C. C. A. 10th, 1936); Webster Co. v. Society for Visual Education, 83 F. (2d) 47 (C. C. A. 7th, 1936); Sutherland v. United States, 74 F. (2d) 89 (C. C. A. 8th, 1934) (partnership defendant); Southern Pacific Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A. 9th, 1911); Bacon v. Federal Reserve Bank of San Francisco, 289 Fed. 513 (E. D. Wash. 1923); Railroad Comm'rs of Florida v. Burleson, 255 Fed. 604 (N. D. Fla. 1919); City of Memphis v. Board of Directors of St. Francis Levee Dist., 228 Fed. 802 (W. D. Tenn. 1916); Rubber & Celluloid Harness Trimming Co. v. John L. Whiting—J. J. Adams Co., 210 Fed. 393 (D. Mass. 1913); Newell v. Baltimore & O. R. R., 181 Fed. 698 (C. C. W. D. Penn. 1910); Whittaker v. Illinois Central R. R., 176 Fed. 130 (C. C. E. D. La. 1910); Smith v. Detroit & T. S. L. Ry., 175 Fed. 506 (C. C. N. D. Ohio 1909); Cound v. Atchison, T. & S. F. Ry., 173 Fed. 527 (C. C. W. D. Tex. 1909); Sunderland Bros. v. Chicago, R. I. & P. Ry., 158 Fed. 877 (C. C. D. Neb. 1908).

[12] Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. Conn. 1939).

[13] Macon Grocery Co. v. Atlantic C. L. R. R., 215 U. S. 501, 511, 30 S. Ct. 184, 188, 54 L. ed. 300, 305 (1910) (dissenting opinion).

[14] McCormick Harvesting Machine Co. v. Walthers, 134 U. S. 41, 10 S. Ct. 485, 33 L. ed. 833 (1890); Tate v. Baugh, 252 Fed. 317 (W. D. Tenn. 1918); Evansville Courier Co. v. United Press, 74 Fed. 918 (C. C. D. Ind. 1896); Bostwick v. American Finance Co., 43 Fed. 897 (C. C. S. D. N. Y. 1890); Pitkin County Min. Co. v. Markell, 33 Fed. 386 (C. C. D. Col. 1887) (removal); St. Louis, V. & T. H. R.R. v. Terre Haute & I. R. R., 33 Fed. 385 (C. C. S. D. Ill. 1887) (removal); Fales v. Chicago, M. & St. P. Ry., 32 Fed. 673 (C. C. N.

there obtain valid service of process on the defendant.)[15] It is equally clear that whether or not diversity of citizenship is the sole ground of jurisdiction the plaintiff cannot, over seasonable objection by the defendant, place his suit in a district where neither the plaintiff nor the defendant resides.[16] Obviously, cases of this latter type do not require a holding that another ground for jurisdiction in addition to diversity of citizenship will rob plaintiff of any option to sue in his own district and necessitate suit in the district of the defendant's residence, and any statement or implication to that effect would be pure dicta. Nevertheless, the majority in the *Macon Grocery* case relied heavily on such precedents to reach their conclusion that the presence of any foundation for jurisdiction other than diversity of citizenship would necessitate dismissal of suits brought in the district of the residence of the plaintiff. This faulty application of *stare decisis* is ably pointed out by Mr. Justice Harlan. He also finds it passing strange that the plaintiff should lose his option to sue in his home district merely because he is fortunate enough to possess another ground for invoking federal jurisdiction in addition to his diversity of citizenship.[17*]

Consider the effect in the instant case. The plaintiffs cannot rid their suit of the federal question because the court will take judicial cognizance (when brought to its attention by defendant's objection) of any federal laws involved regardless of whether or not they are pleaded.[18] Plaintiffs are citizens of Mississippi; two of the defendants

D. Iowa 1887) (removal). *Contra:* County of Yuba v. Pioneer Gold Mining Co., 32 Fed. 183 (C. C. N. D. Calif. 1887), *overruled* Wilson v. Western Union Tel. Co., 34 Fed. 561 (C. C. N. D. Calif. 1888).

[15] American Indemnity Co. v. Detroit Fidelity & Surety Co., 63 F. (2d) 395 (C. C. A. 5th, 1933); Koncewicz v. East Liverpool City Hospital, 31 F. Supp. 122 (W. D. Penn. 1940); Gutschalk v. Peck, 261 Fed. 212 (N. D. Ohio 1919).

[16] Luckett v. Delpark, 270 U. S. 496, 46 S. Ct. 397, 70 L. ed. 703 (1926); Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry., 270 U. S. 363, 46 S. Ct. 247, 70 L. ed. 633 (1926); Camp v. Gress, 250 U. S. 308, 39 S. Ct. 478, 63 L. ed. 997 (1919); Ladew v. Tennessee Copper Co., 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1096 (1910); *Re* Keasbey & Mattison Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402 (1895); Southern Pacific Co. v. Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942 (1892); *Ex Parte* Shaw, 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768 (1892); Findlay v. Florida E. C. Ry., 68 F. (2d) 541 (C. C. A. 5th, 1934); Pacific Mutual Life Ins. Co. v. Tompkins, 101 Fed. 539 (C. C. A. 4th, 1900); Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117 (C. C. E. D. N. C. 1910); Schultz v. Highland Gold Mines Co., 158 Fed. 337 (C. C. D. Ore. 1907); Tice v. Hurley, 145 Fed. 391 (C. C. W. D. Ky. 1906); A. L. Wolff & Co. v. Choctaw, O. & G. R. R., 133 Fed. 601 (C. C. E. D. Ark. 1904); Bensinger Self-Adding Cash Register Co. v. National Cash Register Co., 42 Fed. 81 (C. C. E. D. Mo. 1890). *But cf.* Rowitzer v. Wyatt, 40 Fed. 609 (C. C. S. D. Calif. 1889) (partnership).

[17*] See note 13 *supra*. His further argument that the decision of the majority would destroy the right to remove is now nullified by subsequent holdings to the effect that the venue statue places no restrictions on removals. See note 9 *supra*.

[18] Whittaker v. Illinois Central R. R., 176 Fed. 130 (E. D. La. 1910); Cound v. Atchison, T. & S. F. Ry., 173 Fed. 527 (C. C. W. D. Tex. 1909); Sunderland Bros. v. Chicago, R. I. & P. Ry., 158 Fed. 877 (C. C. D. Neb. 1908); *accord,* Male v. Atchison, T. & S. F. Ry., 240 U. S. 97, 36 S. Ct. 351, 60 L. ed. 544 (1916);

are alleged to be citizens of Washington, D. C. and two are citizens of Maryland. To obtain complete federal adjudication of their rights plaintiffs must sue each defendant in the district of which he is an inhabitant. Thus plaintiffs must incur the expense of at least two distant suits—one in Washington and one in Maryland. The Washington defendants could not be sued in Maryland over their objection; the Maryland defendants could not be sued in Washington.[19*] Also, all of the defendants might very easily be indispensable parties. In such event, if they continued their refusal to waive venue, suits brought in either Washington or Maryland would be dismissed because of the absence of the indispensable defendants.[20] Thus, the plaintiffs would be completely barred from all access to the federal courts merely because they were so unfortunate as to possess two perfectly good grounds for substantive federal jurisdiction instead of only one.

An amendment to the statute striking out the objectionable word "only" and allowing plaintiffs to sue in their own districts whenever diversity of citizenship is shown would greatly clarify the situation.

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Negligence—Res Ipsa Loquitur—Application to Unexplained Automobile Accident

The Supreme Court of North Carolina recently applied the doctrine of *res ipsa loquitur* in a civil action for personal injuries arising out of an unexplained automobile accident. That doctrine is often stated as follows: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by

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Rubber & Celluloid Harness Trimming Co. v. John L. Whiting—J. J. Adams Co., 210 Fed. 393 (D. Mass. 1913); Smith v. Detroit & T. S. L. R. R., 175 Fed. 506 (C. C. N. D. Ohio 1909); *cf.* Wilhelm v. Consolidated Oil Corp., 84 F. (2d) 739 (C. C. A. 10th, 1936); Newell v. Baltimore & O. R. R., 181 Fed. 698 (C. C. W. D. Penn. 1910).

[19*] Camp v. Gress, 250 U. S. 308, 39 S. Ct. 478, 63 L. ed. 997 (1919); Findlay v. Florida E. C. Ry., 68 F. (2d) 541 (C. C. A. 5th, 1934); Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117 (C. C. E. D. N. C. 1910); Schultz v. Highland Gold Mines Co., 158 Fed. 337 (C. C. D. Ore. 1907); Tice v. Hurley, 145 Fed. 391 (C. C. W. D. Ky. 1906); Bensinger Self-Adding Cash Register Co. v. National Cash Register Co., 42 Fed. 81 (C. C. E. D. Mo. 1890). *Contra:* Rawitzer v. Wyatt, 40 Fed. 609 (C. C. S. D. Calif. 1889) (partnership). Conversely, where there is diversity of citizenship a suit brought in the district of the residence of a plaintiff may be dismissed as to any other non-resident plaintiffs because *as to them* the venue is not laid in either the district of the residence of the plaintiff or the defendant. Smith v. Lyon, 133 U. S. 315, 10 S. Ct. 303, 33 L. ed. 635 (1890).

[20] Findlay v. Florida E. C. Ry., 68 F. (2d) 541 (C. C. A. 5th, 1934); *see* Camp v. Gress, 250 U. S. 308, 316, 39 S. Ct. 478, 481, 63 L. ed. 997, 1003 (1919).